No. 82397-9

SUPREME COURT OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL, *Respondents*,

v.

CITY OF SHORELINE, a Washington municipal corporation, and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity, *Petitioners*.

BRIEF OF AMICUS CURIAE WASHINGTON COALITION FOR OPEN GOVERNMENT

William John Crittenden
Attorney at Law
927 N. Northlake Way, Ste 301
Seattle, Washington 98103
(206) 361-5972
(206) 361-5973 (fax)
wjcrittenden@comcast.net

Prof. Patrick D. Brown
Seattle University School of Law
Sullivan Hall, Room 410
900 Broadway
Seattle, Washington 98122
(206) 398-4121
brownp@seattleu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. IDENTITY AND INTEREST OF AMICUS

The mission, membership and interest of the Washington Coalition for Open Government ("WCOG") are set forth in WCOG's *Motion for Leave to File Brief of Amicus Curiae* filed herewith. WCOG's interest is to ensure that the Court is fully briefed on the important issues involving the Public Records Act, Chapter 42.56 RCW ("PRA") in this case.

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 187 P.3d 822 (2008), and the briefs of the parties.

III. ARGUMENT

Although the concept of ***metadata*** may be novel, the PRA draws no significant distinction between paper and electronic records. This case requires only the application of well-established rules under the PRA:

- The email originally received by Deputy Mayor Fimia ***in electronic form*** was a public record.
- The metadata attached to the email was a ***part*** of that public record.
- O'Neill's initial request to "see that e-mail" was a specific request for an ***identifiable*** public record.
- O'Neill's initial request triggered the City's duty under RCW

42.56.100 to retain possession of the original electronic record, with its metadata, until O'Neill's request was fully resolved.

- The City violated RCW 42.56.100 by deleting the electronic original without clarifying whether O'Neill wanted to inspect the email, receive a paper copy, or receive an electronic copy.
- This case should be remanded to the trial court to provide an appropriate remedy for the City's violation of the PRA.

The parties make a number of extraneous legal and factual arguments. These arguments create a heightened risk of erroneous dicta in this important case. This Court should avoid any definitive conclusions on legal issues that are not squarely presented, and this Court should not attempt to craft broad legal rules that would apply to all types of metadata or all species of electronic records. Nor is it necessary for this Court to decide the messy factual issues of when and/or why Fimia destroyed the original email. The fact that she did so in violation of RCW 42.56.100 is abundantly clear. The details are relevant only to the question of remedy.

In an attempt to avoid liability, the City and Fimia present various arguments that misapply the concepts of "writing," "public record," and "identifiable" record, and ignore the duty under RCW 42.56.100 to preserve requested records notwithstanding otherwise applicable retention policies. The City and Fimia also seek to (i) shift the burden of proof to

the requester, (ii) authorize absurdly inadequate civil procedures in PRA cases, and (iii) limit the ability of requesters to recover attorney's fees, contrary to the clear language and policy of the PRA.

Those arguments are nothing more than a poorly disguised attempt by local governments to significantly weaken the PRA. As this Court observed more than thirty years ago in *Hearst v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978), "leaving interpretation of the [PRA] to those at whom it was aimed would be the most direct course to its devitalization."

A. The email message originally received by Fimia *in electronic form* was an existing "public record."

The starting point for a correct analysis of this case is to recognize that the email message originally received by Fimia ***in electronic form*** on September 18, 2006, was an existing "public record" for purposes of the PRA. *O'Neill*, 145 Wn. App. at 923. The email message ***in electronic form*** was a "writing" under RCW 42.56.010(3), which broadly includes any form of electronic information. *Mechling v. Monroe*, ¶¶ 22-23, 152 Wn. App. 830, __ P.3d __ (2009). The email message received by Fimia was a "public record" under RCW 42.56.010(2) because it was a "writing" that related to the conduct of government. *O'Neill*, 145 Wn. App. at 923. Therefore, although other facts may be disputed, it is undisputed that when Ms. O'Neill asked to "see that e-email," that identifiable record existed as

a writing in electronic form, and was a "public record" under the PRA.[1]

B. The metadata attached to the email originally received by Fimia in electronic form was part of that public record.

It is undisputed that the email originally received by Fimia in electronic form included certain attached metadata. Fimia and the City variously argue that the attached metadata (or some portion of the metadata) was not a "public record" under RCW 42.56.010(2). The Court of Appeals disagreed, concluding that the metadata "or some portion of it, is also a public record." *O'Neill*, 145 Wn. App. at 925. Fimia and the City are wrong, and the Court of Appeals' analysis is unnecessary. The metadata was only a ***part*** of the larger "public record."

Nothing in the PRA allows an agency or a court to dissect individual writings into parts that meet the definition of "public record" and parts that do not. As the Arizona Supreme Court correctly observed, "***The metadata in an electronic document is part of the underlying document; it does not stand on its own.***" *Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004, 1007 (2009) (emphasis added). Based on the expansive definitions of "writing" and "public record" under the PRA, this

[1] The Court of Appeals' analysis on this point is too narrow, implying that the email was a public record only because it was "used" by Fimia at the public meeting. *O'Neill*, 145 Wn. App. at 923-24. Because the email was a "writing containing information relating to the conduct of government," it became a "public record" when it was received by Fimia.

Court should hold that the metadata attached to the email originally received by Fimia in electronic form was only a ***part*** of that public record.

1. The requester does *not* have the burden to prove that the email is a "public record."

As a threshold matter, the Court should reject Fimia's argument that O'Neill has the burden to prove that the metadata was a "public record." Fimia cites *Dragonslayer, Inc. v. Gambling Comm'n*, 139 Wn. App. 433, 441, 161 P.3d 428 (2007), for the proposition that "the burden is on the requester to prove the requested record is a 'public record' subject to the PRA in the first place." *Fimia Supp. Br.* at 13. The dicta in *Dragonslayer*, on which Fimia relies, is clearly wrong. *Dragonslayer* asserts, without meaningful analysis of the language, structure or policy of the PRA, that the burden of proof imposed on a party resisting disclosure under RCW 42.56.540 is applicable only after "the threshold inquiry of whether a document is a 'public record' is met." 139 Wn. App. at 441. This dicta implies, but does not actually hold, that the requester has the burden to prove that a record is a "public record."[2] Contrary to the erroneous dicta in *Dragonslayer*, the PRA never places the burden of proof on the requester. The only burdens are on the agency and/or party

[2] This part of *Dragonslayer* is dicta because the court never actually applied the burden of proof in determining that a remand was necessary. 139 Wn. App. at 442-46.

resisting disclosure. RCW 42.56.210(3); RCW 42.56.540; RCW 42.56.550(1). If there were any ambiguity as to which party has the burden of proof on the question of whether a record is a "public record," the PRA must be liberally construed in favor of the requester by placing the burden of proof on the agency. *See Progressive Animal Welfare Soc'y v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Placing the burden of proof on the requester not only violates this fundamental rule, it is incompatible with the statutory duties of agencies under the PRA. Under the PRA, agencies are required to respond to requests for records, to preserve requested records, and to provide the fullest assistance to requesters. RCW 42.56.070, -.100, Furthermore, agencies are required to explain why records are exempt, in whole or in part, are forbidden to silently withhold any records, and must provide a log of any records that are withheld. *PAWS II*, 125 Wn.2d at 270, 271 n.18. All of these obligations apply to "public records." If a requester had an initial burden to show that the requested records are "public records," then the entire enforcement structure of the PRA would fall apart.

This Court should reject *Dragonslayer*, and clearly state that the burden of proof under the PRA is always borne by the agency (and/or a third party resisting disclosure), including the burden to prove that any writing is not a "public record." To hold otherwise would allow agencies

to silently withhold records in violation of *PAWS II* whenever the agency concludes, unilaterally, that requested records are not "public records."

2. It does not matter whether the attached metadata meets the definition of "public record."

The City and Fimia argue that the deleted portions of the metadata do not meet the definition of "public record" under RCW 42.56.010(2). *Fimia Supp. Br.* at 14-16; *City's Supp. Br.* at 14-16. These arguments are irrelevant because the metadata is simply a ***part*** of the record. Furthermore, the PRA does not allow agencies to withhold a portion of a public records unless the specific portion is exempt from disclosure. *PAWS II*, 125 Wn.2d at 250. The recent *Mechling* case clarified that the definition of "public record" under RCW 42.56.010(2) is ***not*** a statutory exemption under the PRA. *Mechling*, ¶ 54. In *Mechling*, the agency redacted certain information allegedly relating to birthdays and lunches on the grounds that this information did not meet the definition of "public record." The Court of Appeals correctly held that the definition of "public record" was not an exemption, and that the redactions were improper. *Mechling*, ¶¶ 52-54. Similarly, it does not matter whether the metadata attached to the email meets the definition of "public record." Under RCW 42.56.100, the City was not permitted to destroy any part of the original record. Nor was the City permitted to redact any part of the original email

unless a specific exemption applied to the redacted part.

3. The City's arguments about "retention value" are irrelevant.

The City argues that the deleted metadata was "at most, a public record with no retention value." *Petition* at 10-12. This argument is based on a concept of "retention value" that is meaningless under the PRA. Agencies are required to preserve requested records even if retention policies would allow the agency to destroy the records. RCW 42.56.100; *see* section C (below). There is no issue of "retention value" in this case.

The City's analogy to the envelopes from paper letters demonstrates the fundamental difference between the PRA and records retention policies. The City states that "For example, envelopes, a public record under the PRA, are disposed of once the envelope has served its purpose of delivering the letter to the City." *Petition* at 11. It is undoubtedly true that agencies are permitted to discard ordinary envelopes as soon as they have been opened. Nevertheless, if a person asked to inspect or copy envelopes under the PRA, and those envelopes had not been discarded when the request was made, the agency would be required to preserve the requested envelopes under RCW 42.56.100.

4. It is neither necessary nor appropriate to adopt broad rules regarding all types of metadata.

This case is about the metadata within an email message that was improperly modified and then deleted after it had been requested, in violation of RCW 42.56.100. *See* section C. It is neither necessary or appropriate for this Court to address other types of metadata, or to attempt to adopt broad rules addressing all types of metadata.[3]

C. O'Neill's initial request to "see that e-mail" obligated the City to retain the original email received by Fimia, in electronic form, until O'Neill's PRA request was resolved.

Relying on narrow interpretations of O'Neill's request to "see that e-mail," the City and Fimia argue that O'Neill did not actually request the electronic email or its metadata until September 25th, after Fimia had deleted the email. Similarly, the Court of Appeals made a narrow factual determination that O'Neill "did not request an electronic copy of the e-mail or its metadata on September 18." *O'Neill*, 145 Wn. App. at 933.

These arguments fail as a matter of law. RCW 42.56.100 unambiguously forbids the destruction of records while a request for such

[3] Fimia suggests that some email metadata ("header" information) is automatically deleted or changed when an email message is forwarded. *Fimia Supp. Br.* at 5-6. No party has argued that such automatic changes to email metadata would violate state record retention laws. It is neither necessary nor appropriate for the Court to address the question of whether such ephemeral metadata could be requested under the PRA after it was already destroyed in the ordinary course of forwarding (or archiving) the email message to which it was previously attached.

records is pending, even if records are scheduled for destruction. That section, which the City and Fimia have consistently ignored, provides:

> If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency ... shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

Like all other provisions in the PRA, RCW 42.56.100 must be liberally interpreted in favor of public disclosure. *PAWS II*, 125 Wn.2d at 251, 884 P.2d 592 (1994). This statute does not allow agencies to speculate about what part of a record has been requested and unilaterally destroy the other parts. A request for records may require clarification, *see* RCW 42.56.520, and that there may be disputes as to the scope of a request and/or whether records are exempt. Consequently, RCW 42.56.100 clearly states that an agency "***shall retain possession of the record, and may not destroy or erase the record until the request is resolved.***" The City violated this statute when Fimia deleted the email from her computer.

The email message received by Fimia and mentioned at the public hearing was an ***identifiable*** public record. RCW 42.56.080; *see Bonamy v. Seattle*, 97 Wn. App. 403, 409-410, 960 P.2d 447 (1998). It does not matter whether Fimia or the City honestly thought that O'Neill's request was satisfied by a printed copy of the email. Upon receiving any written or oral request for that email the Deputy Mayor, and the City as a whole,

were obligated to preserve the original electronic public record until O'Neill's request was fully resolved.[4]

1. Destruction of the original email was forbidden by RCW 42.56.100 regardless of whether such destruction was permissible under record retention guidelines.

The City argues that the Court of Appeals "erroneously concluded that a 'conflict' exists with the State Retention Guidelines and the PRA."[5] *Petition* at 7. The Court of Appeals correctly rejected this argument, noting that the record retention guidelines do not inform the question of whether the City violated the PRA by destroying requested records. *O'Neill*, 145 Wn. App. at 934. As explained above, RCW 42.56.100 unambiguously forbids the destruction of records while a request for such records is pending, even if the record is scheduled for destruction.

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[4] It is not necessary to determine whether O'Neill's oral request necessarily encompassed an electronic copy of the email along with all the metadata, *O'Neill Supp. Brief* at 13-16, and it does not matter whether the City should have provided an electronic copy in response to O'Neill's initial request to "see that e-mail." The PRA recognizes that a PRA request may require clarification. RCW 42.56.520. As O'Neill points out, an ordinary person cannot be expected to make an explicit request for "metadata" when making an initial request for records. *O'Neill Supp.* Br. at 14. If Fimia had not deleted the email in violation of RCW 42.56.100, the City could have provided a complete response a week later, after O'Neill clarified that she wanted the entire email and its metadata.

[5] Contrary to the City's argument, the Court of Appeals did not find a "conflict" between the PRA and the record retention guidelines. The word "conflict" appears only once in the opinion, in a paragraph of general rules. There, the court merely noted that the PRA controls in the event of a conflict with another law. *Id.*, *see* RCW 42.56.030. That statement, while not actually necessary to the rejection of the City's meritless argument, is entirely correct. RCW 42.56.030 ("In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.")

O'Neill's original request to "see that e-mail" triggered the City's obligation under RCW 42.56.100 to preserve the original electronic record until O'Neill's request was fully resolved.

2. It is not necessary to determine whether Fimia's conduct was authorized by record retention laws.

Because RCW 42.56.100 forbids the destruction of the original email, it is not necessary to decide whether that destruction otherwise would have been allowed under record retention laws or whether a violation of such laws would amount to a violation of the PRA. *See BIAW v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009). This is not an appropriate case to address such issues.

D. The case must be remanded to the trial court for further proceedings to remedy the City's violation of RCW 42.56.100.

This matter must be remanded to the trial court to provide a remedy for the City's violation of RCW 42.56.100. The PRA does not constrain a superior court's authority to enforce the law. An action under the PRA is an ordinary civil action, *see Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104-05, 117 P.3d 1117 (2005), so all of the superior court's remedial powers should be available on remand.

1. It is not necessary to decide whether the PRA applies to lawfully deleted records.

The City argues, without citation to any authority, that "a court cannot force an agency to conduct a hard drive search to locate a record that was properly deleted in compliance with the law." *City's Supp. Br.* at 13. It is not necessary to reach this issue because the email message at issue in this case was deleted in clear violation of RCW 42.56.100. Nor is it necessary to decide whether the PRA applies to lawfully deleted records. O'Neill notes that there have been significant cases where government misconduct was unearthed in deleted emails. *O'Neill Answer to WSAMA* at 8. The Court should wait for an appropriate case to address such issues.

2. It does not matter whether an *unlawfully* deleted email message is an "identifiable" record.

The City cites RCW 42.56.080 for the proposition that the PRA only requires production of "identifiable public records." *City's Supp. Br.* at 13. But the City's argument is based on the erroneous assumption that the email message was "legally deleted." *Id.* at 14. It is undisputed that the email received by Fimia was "identifiable" ***before*** Fimia deleted it.

Obviously, an agency is not permitted to delete a requested record in violation of RCW 42.56.100 and then assert that the record is no longer "identifiable." RCW 42.56.080 imposes a duty to respond to requests for

"identifiable public records" while RCW 42.56.100, in turn, requires agencies to retain such requested records until a PRA request is resolved. Read together, these sections indicate that a record must be "identifiable" when it is requested. It does not matter whether an unlawfully deleted email message is an "identifiable" record. No party argues otherwise.

3. If the original email has been destroyed then the parties will need to brief the trial court on the issue of how to calculate penalties.

On remand the trial court will need to determine the amount of penalties to be imposed pursuant to RCW 42.56.550(4). It is unclear how the penalty period would be determined if the City is not able to recover the deleted email. If the record has been destroyed, the parties will need to brief this issue in the trial court. This issue should not be addressed by this Court as the issue is neither squarely presented nor adequately briefed.

E. Prospective application of a decision in favor of the requester is not warranted in this case or in any PRA case.

The City argues that any conclusion that "all metadata is a public record" should not be applied retroactively. *City's Supp. Br.* at 17. Setting aside the City's mischaracterization of the relevant legal issue, this recycled attack on the ability of requesters to recover attorney's fees

should be categorically rejected.[6] The first *Chevron Oil*[7] factor is clearly lacking. While the application of the PRA to email metadata may be somewhat novel, it does not amount to a new rule of law. The basic definition of "writing," which states that any form of computer data is subject to the PRA, has existed since 1973. Laws of 1973 c 1 § 2. That definition was amended in 1992 to include "data compilations from which information may be obtained or translated." Laws of 1992, ch. 139, § 1. The conclusion that metadata is part of an electronic public record is clearly required by the plain language of RCW 42.56.010(2).

More importantly, the second and third *Chevron Oil* factors are necessarily lacking in any PRA case where a court rules in favor of the requester. Prospective application would harm the PRA because fee awards are intended to promote full access to public records. *Yousoufian v. Sims*, 114 Wn. App. 836, 855, 60 P.3d 667 (2003). Nor would retroactive application be inequitable in light of the policy of strict enforcement of the PRA. *PAWS II*, 125 Wn.2d at 272.

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[6] Counsel for the City made substantially the same argument in the *Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *see Resp. Br.* (No. 82288-3) at 21-22.

[7] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The current validity of the test in Washington is unclear. *See Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004). The Court can safely avoid that issue in this case because the City's analysis of the *Chevron Oil* factors is meritless.

F. Although the issue is moot, the trial court erred in dismissing the case on O'Neill's motion for an order to show cause.

A correct understanding of this issue requires a correct understanding of the facts. At the outset of this case, O'Neill filed a one-paragraph motion, noted without oral argument, which merely requested that the trial court issue an order to show cause. CP 10. In opposition to this procedural formality, the City filed a 13-page response supported by five separate declarations. The City argued, *inter alia*, that all responsive records had been produced, and that the original email had been properly deleted. CP 19-52. O'Neill had almost exactly ***24 hours*** to prepare and file a short reply. CP 53-57, 165. Without holding any sort of hearing, the trial court denied the motion and dismissed the action. CP 139-41.[8]

As the beneficiary of this unfair process, the City has consistently misrepresented what actually happened in the trial court, asserting that the case was dismissed at a "show cause hearing," that this was a "process selected by the O'Neills," and that "O'Neills sought to have the dispute resolved in a show cause hearing." *Resp. Br.* at 1, 11, 13, 14; *City's Reply* at 11. There was no "show cause hearing." The *Motion* to issue an order

[8] This was a bizarre departure from the typical show cause procedure. An order to show cause requires the agency to respond, and results in a show cause hearing or other process at a later date. *See Spokane Research*, 155 Wn.2d at 95. The issuance of an order to show cause, which was the only relief requested in O'Neill's *Motion*, is normally a formality, and such orders are (or were) usually obtained ex parte. *See Wood v. Lowe*, 102 Wn. App. 872, 875, 10 P.3d 494 (2000).

to show cause was denied outright. O'Neill did ***not*** "select" this absurdly truncated process in which she had 24 hours to avoid a final dismissal.

The Court of Appeals erroneously assumed that the case was dismissed "after the show cause hearing." *O'Neill*, 145 Wn. App. at 919. But there was no show cause hearing. The *Motion* for an order to show cause was denied. Based on a misunderstanding of the facts, the Court of Appeals opined that the trial court procedure was authorized by RCW 42.56.550(1). *O'Neill*, 145 Wn. App. at 938. Yet the suggestion that the trial court procedure was adequate cannot be reconciled with the court's determination that the record was inadequate on several matters of fact and that a remand was required. *O'Neill*, 145 Wn. App. at 936.

To the extent the trial court had discretion to choose the procedure used in adjudicating the merits of O'Neill's claims,[9] the court clearly abused that discretion. Because a remand is required, the issue is moot,

[9] It is unclear whether the abuse of discretion standard is appropriate for such procedural rulings. In general, the appellate court stands in the same position as the trial court, reviewing the agency action de novo. *Lindeman v. Kelso School Dist.*, 162 Wn.2d 196, 200, 172 P.3d 329 (2007) (citing *PAWS II*, 125 Wn.2d at 252). The City cites *Spokane Research*, 155 Wn.2d at 104-05, for the proposition that "a trial court has the discretion to employ any of the procedures in the Civil Rules, including summary judgment and intervention." *Spokane Research* actually states that the show cause proceeding in RCW 42.56.550(1) is "discretionary," but the context suggests that the Court meant that the ***requester*** has the option to select the show cause process. 155 Wn.2d at 104-05 (rejecting argument that show cause procedure was mandatory). It is not necessary for the Court to decide that issue and it should not do so in this case.

and the Court should avoid any definitive analysis of the procedural issues.

However, the Court should reiterate two essential points about litigation under the PRA. First, the PRA is an ordinary civil action except as modified by the PRA statute. *Spokane Research*, 155 Wn.2d at 105. Second, the PRA must be liberally interpreted to promote full disclosure. *Id.* at 100. The trial court should be guided by these principles on remand.

The City notes that RCW 42.56.550(3) allows a court to conduct a hearing on affidavits. *Reply to Answer* at 14. However, the fact that this procedure is authorized does not mean that it is appropriate in every case, or that it should be used to resolve complex issues of fact. This procedure should not be used to the disadvantage of the requester, or to relieve an agency of its statutory burden to prove that requested records are exempt. RCW 42.56.550(1). *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990), cited by the City, indicates a reluctance to "interfere with trial courts' litigation management decisions," but the context indicates that the *Brouillet* court recognized that a trial court would have the discretion to allow discovery and oral testimony.

The City also argues that reversal of the Court of Appeals decision "would do damage to the PRA by allowing requestors or agencies to insist on discovery and a trial, quickly making PRA cases so expensive that

citizens could not use the PRA for its intended purpose." *City's Reply to Answer* at 11. This is both an exaggeration and a tacit acknowledgment that ***agencies*** — not requesters — are likely to use unnecessary process to drive up the cost of PRA litigation. The solution to that problem is to strictly enforce the burden of proof and other PRA requirements, and to be watchful of agency litigation tactics. There is no reason to weaken the PRA by limiting the procedural options available to requesters.

G. O'Neill is entitled to attorney's fees under RCW 42.56.550(4).

The City argues that the Court of Appeals erred in awarding fees to O'Neill without first concluding that the City had violated the PRA. *Petition* at 16-17. At this point it does not matter why the Court of Appeals awarded fees to O'Neill. O'Neill is the prevailing party because the City violated RCW 42.56.100 by deleting the original electronic email.

Although it is not necessary to reach the issue in this case, the Court should leave open the possibility that a requester may be entitled to attorney's fees for prevailing on a significant issue, whether or not a PRA violation is ultimately found. Contrary to the City's arguments, the Court has not definitively addressed that issue. In *Spokane Research*, the Court rejected the agency's argument that a prevailing party must actually cause the disclosure of records. 155 Wn.2d at 102-04. The Court assumed,

without deciding, that the requester would be entitled to fees and penalties on remand if a violation of the PRA were found. 155 Wn.2d at 106.

Spokane Research suggests a broader interpretation of 'prevailing party' under which requesters who prevail on significant PRA issues may be awarded fees. For example, the requester in *Clarke v. Tri-Cities Animal Care*, 144 Wn. App. 185, 195, 181 P.3d 881 (2008), prevailed on the significant question of whether the defendant was an "agency" under the PRA. Citing *Spokane Research*, the *Clarke* court held that the requester was "not yet the prevailing party in an action to enforce the right to copy or inspect records..." *Clarke*, 144 Wn. App. at 196. But if the purpose of fee awards is to promote "the PRA's broad mandate of openness," *Spokane Research*, 155 Wn.2d at 104 n. 10, then the requester in *Clarke* should have been awarded fees for establishing the public's right to inspect that agency's records. Similarly, O'Neill should be considered a prevailing party if O'Neill prevails on the significant issues in this appeal.

IV. CONCLUSION

The Court should remand this case to the trial court for further proceedings to remedy the City's violation of RCW 42.56.100.

RESPECTFULLY SUBMITTED this 15th day of February, 2010.

William John Crittenden
WSBA No. 22033

William John Crittenden
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, Washington 98103
(206) 361-5972
(206) 361-5973
wjcrittenden@comcast.net

Patrick D. Brown
WSBA No. 23033

Prof. Patrick D. Brown
Seattle University School of Law
Sullivan Hall, Room 410
900 Broadway
Seattle, Washington 98122
(206) 398-4121
brownp@seattleu.edu

Attorneys for Amicus Curiae Washington Coalition for Open Government

CERTIFICATE OF SERVICE

The undersigned certifies that on 15th day of February, 2010, a true and correct copies of the attached *Brief of Amicus Curiae* and *Motion for Leave to File Brief of Amicus Curiae* were served on each of the parties below as follows:

Via Email PDF by Prior Agreement:

Flannary Collins
City of Shoreline
17500 Midvale Ave N
Shoreline WA 98133-4905
fcollins@ci.shoreline.wa.us

Michael G Brannan
Attorney at Law
555 Dayton St Ste H
Edmonds WA 98020-3601
mgbrannan@seanet.com

Ramsey Ramerman
City of Everett
2930 Wetmore Ave
Everett WA 98201-4067
RRamerman@ci.Everett.wa.us

Michele L Earl-Hubbard
Allied Law Group PLLC
2200 6th Ave Ste 770
Seattle WA 98121-1855
michele@alliedlawgroup.com

Gary Smith
Seattle City Attorney's Office
PO Box 94769
Seattle WA 98124-4769
gary.smith@Seattle.gov

Via First Class Mail and Email PDF:

Alan D Copsey
Washington Attorney General
PO Box 40100
Olympia WA 98504-0100
alanc@atg.wa.gov

James W Beck
Gordon Thomas Honeywell LLP
PO Box 1157
Tacoma WA 98401-1157
jbeck@gth-law.com

By: _____

92[illegible] N. Northlake Way, Ste 301
Seattle, Washington 98103
(206) 361-5972